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ABSTRACT

Congress enacted the Family Educational Rights and Privacy Act (FERPA) in 1974 as a floor amendment to a comprehensive education statute. Until 2002, persons trying to understand and comply with FERPA were without guidance from the Supreme Court, which did not hear a single FERPA case from 1974 to 2001. In its 2001-02 term, however, the Court decided two FERPA cases, which are analyzed in this paper: "Owasso Independent School District No. I-011 v. Falvo" holds that peer grading of classroom work does not involve "education records" and thus does not violate FERPA; and ""onzaga University v. Doe" holds that FERPA cannot be enforced under Section 1983, a civil-rights statute. Moreover, Congress amended FERPA to permit somewhat broader disclosure of records in connection with terrorism concerns shortly after September 11, 2001. Congress also now requires, as a condition of receipt of federal Elementary and Secondary Education Act (ESEA) funds, that public and private secondary schools release to requesting military recruiters lists of names, addresses, and telephone numbers of students who have not filed objections. Perhaps as a means of combating drug use, disciplinary records can be transferred to a student's new school in ways consistent with FERPA. (RT)

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FERPA Update 2002: The Two New Supreme Court FERPA Cases, and Post-9/11 Congressional Balancing of Student Privacy and Safety Interests.

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FERPA Update 2002: The two new Supreme Court FERPA cases, and post-9/11 Congressional balancing of student privacy and safety interests

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Congress enacted FERPA in 1974 as a floor amendment to a comprehensive education statute. Almost thirty years later, FERPA has evolved into a large, complex, and confusing body of law. Until 2002 persons trying to understand and comply with FERPA were without guidance from the Supreme Court, which from 1974 to 2001 did not hear a single FERPA case. In its 2001-2002 term, however, the Supreme Court decided two FERPA cases: the *Falvo* case holding that peer grading of classroom work does not involve "education records" and thus does not violate FERPA, and the *Gonzaga* case holding that FERPA can not be enforced under Section 1983, a federal civil rights statute. Moreover, soon after September 11, Congress amended FERPA to permit somewhat broader disclosure of records in connection with terrorism concerns. This paper addresses these (and, briefly, other) recent FERPA developments.

FERPA OVERVIEW

FERPA, 20 U.S.C. §1232g, is Spending Clause legislation. As a condition on the receipt of federal education funds, schools (both public and private, preschool, K-12 and post-secondary) must agree to comply with its terms. FERPA's requirements may be boiled down to four essential ones:

1. Parents/adult students have the right to access their own education records.
2. In general (and with more than a dozen exceptions) schools cannot disclose education records or their contents to third parties without the written consent of the parent/adult student.
3. If a parent/adult student believes their education records to be inaccurate or invasive of privacy, the school must offer an internal hearing.
4. Schools must provide parents/adult students with an annual notice of their FERPA rights.

EA032377

Several sources provide overviews and/or commentary on FERPA.[1]

CONGRESS AND FERPA

In the last year, Congress has amended FERPA to address terrorism-related investigations. Congress has also enacted two other statutes which address FERPA issues.

I Student records and terrorism-related investigations.

As has been discussed elsewhere, FERPA was originally enacted as a floor amendment to a larger piece of legislation. FERPA has been amended many times, but always as a small piece of much larger bills. Congress continued this approach by amending FERPA in a single small section of the extensive, post 9/11 USA Patriot Act (PL 107-56).[2] Specifically, Section 507 of the USA Patriot Act adds a new section (j) to FERPA concerning

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[1]For overviews of FERPA, *see* Family Policy Compliance Office Website, www.ed.gov/Offices/OM/fpco. (includes text of regulations, model policies, letters of finding); National Center for Education Statistics, Protecting the Privacy of Student Records: Guidelines for Education Agencies (NCES 1997), available at http://nces.ed.gov/pubs97/97527.html. (comprehensive overview of FERPA and sample forms); James Rapp, Education Law, vol.1-7 (Matthew Bender 2000) (Section 13.04 is a comprehensive overview of FERPA. Section F7.03 has sample student records forms and policies; section T7 lists state student records laws); John Theumann, Annotation: Construction and Application of Family Educational Rights and Privacy Act of 1974 (20 U.S.C.A., §1232g), 112 A.L.R.Fed. 1 (1993). For academic commentary on FERPA *see* Thomas Baker, Inaccurate and Misleading: Student Hearing Rights under FERPA, 114 West Educ. L. Rep. 721 (1997); Lynn Daggett, Bucking Up Buckley I: Making the Federal Student Records Statute Work, 46 Cath. U. L. Rev. 617 (1997) (overview of FERPA and suggestions for change); Lynn M. Daggett and Dixie Snow Huefner Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records, 51 American Law Review 1-48 (2001) (discussion of the 10th Circuit decision in *Falvo* and the *Miami U.* discipline records case); Lynn Daggett, Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute, 21 Seattle L. Rev. 29 (1997) (overview of remedies under FERPA); Maureen Rada, The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone, 59 Ohio St. L.J. 1799 (1998) (discussing the Ohio Supreme Court decision in the Miami University case); Dixie Snow Huefner and Lynn M. Daggett, FERPA Update: Balancing Access to and Privacy of Student Records, 152 Education Law Reporter 469-91 (2001) (updated overview of FERPA).

[2]The complete text of FERPA's new section is as follows:
"j) Investigation and prosecution of terrorism
(1) In general
Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--
(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and
(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.
(2) Application and approval

subpoenas of student records in the context of terrorism-related investigations. The federal Department of Education has not yet enacted regulations to implement new section (j), but has issued a detailed letter of guidance.[3]

At first blush, the new section (j) appears to add little. In general FERPA requires schools to give parents notice before complying with a subpoena (such subpoenas are hereinafter referred to as "general subpoenas").[4] However, FERPA also provides that courts (and federal grand juries) may issue subpoenas of student records for law enforcement purposes, and that these law enforcement subpoenas may direct the school to keep them confidential even as to the involved student/parents (such subpoenas are hereinafter referred to as "confidential law enforcement subpoenas").[5]

FERPA's new section (j) added by the USA Patriot Act concerns subpoenas of student records for terrorism-related investigations (such subpoenas are hereinafter referred to as "confidential terrorism investigation-related subpoenas"). Like the pre-existing confidential law enforcement subpoena language, new section (j) limits confidential terrorism investigation-related subpoenas to those issued by courts. Normally the application to the court for the subpoena will be by the U.S. Attorney General's Office.[6] However, the Attorney General's Office does not have the power to access student records on its own, a court-issued subpoena must be obtained.

Presumably, even before the addition of new section (j), the Attorney General's Office could have utilized the existing confidential law enforcement subpoena provision to obtain court-issued subpoenas of student records which directed schools to keep the subpoena's existence and contents confidential, even as to the involved student/parents. However, the new section (j) changes the law governing subpoenas of FERPA records in several

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(A) In general
An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).
(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).
(3) Protection of educational agency or institution
An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.
(4) Record-keeping
Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection."

[3]FPCO Letter "Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities." April 12, 2002 (available at www.ed.gov/offices/OM/FPCO).

[4]20 U.S.C. §1232g(b)(2)(B).

[5]20 U.S.C. §1232g(b)(1)(J).

[6]The statute provides that some other federal employees may apply for confidential terrorism-investigation related subpoenas. The section refers specifically to "the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General)."

respects. First, schools are granted immunity for complying in good faith with subpoenas of student records for terrorism-related investigations. FERPA contains no general good faith immunity provision, nor any specific immunity provision for general subpoenas nor for confidential law enforcement subpoenas. The availability of immunity may serve as an incentive for some schools to comply with the confidential terrorism-related investigation subpoena rather than apply to the court to quash or modify it.

Second, new section (j) explicitly provides that confidential terrorism investigation-related subpoenas are not to be included in FERPA access logs. FERPA requires schools to maintain a log of disclosure requests by outsiders (i.e. persons other than the family or other employees of the school).[7] Access to the log is limited to the family and custodian of records.[8] Not including confidential terrorism investigation-related subpoenas in the access log means, of course, that the family will not be able to learn of the subpoena by accessing the log. Pre-existing FERPA regulations exclude confidential law enforcement subpoenas from access logs, although the statute itself does not explicitly address this issue.[9]

Third, and most significantly, new section (j) provides a lower standard for issuing a confidential terrorism investigation-related subpoena than is used for law enforcement subpoenas generally. A court "shall" issue a confidential terrorism investigation-related subpoena if "there are specific and articulable facts giving reason to believe that the education records are likely to "contain information "relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title."

Prior to the enactment of new section (j), schools[10] presented with general subpoenas or confidential law enforcement subpoenas sometimes went to court to ask that the subpoena be quashed or modified. In such cases, courts routinely have inspected the subpoenaed records in camera, and balanced the student's privacy interests with the subpoenaer's need for the records.[11] The result of this in camera review and balancing is often a quashing or limiting of the subpoena. It is unclear whether schools presented with confidential terrorism investigation-related

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[7]20 U.S.C. §1232g(b)(4)(A).

[8]*Id.*

[9]34 C.F.R. §99.32(d)(5) excludes from FERPA access logs: "A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed."

[10]Or, in the case of general FERPA subpoenas, the family of the student whose records were subpoenaed would sometimes go to court.

[11]See, e.g., Venson v. State, 74 F.3d 1140 (11th Cir. 1996) (*in-camera* review of student records in a criminal trial to discover any exculpatory material to be released to the defendant); Gillard v. Boulder Sch. Dist., 2000 WL 1269747 (D. Colo. 2000) (protective order keeping student records confidential in a student tort claim against a school).

FERPA subpoenas will choose to go to court to seek this in camera review and balancing of interests. The statutory grant of immunity for good faith compliance with such subpoenas may influence schools to comply without prior court review. If schools do ask courts to review confidential terrorism investigation-related FERPA subpoenas, it is unclear whether courts will perform an in camera review and balancing test. There are media reports of libraries applying to courts to quash or modify USA Patriot Act subpoenas of library records, with some success.[12]

II Access to students and student information by military recruiters.

While not actually amending FERPA's language, Congress has effectively modified FERPA's directory information provisions as regards secondary schools and military recruiters. Existing FERPA law permits schools to designate categories of certain not-too-private information (such as names and addresses and degrees received) as directory. Once a school designates categories of information as directory, and so notifies families and gives them a chance to object, the school may choose to release directory information about non-objecting students to persons or entities of its choosing.[13] Thus, for example, a school could choose to release an honor roll or dean's list (of non-objecting students' names) to the local newspaper if it followed the above-described procedure for designating student honors and awards as directory information.

In contrast to existing directory information language, which permits but does not require schools to release directory information, Congress now requires, as a condition of receipt of federal ESEA funds, public and private secondary schools to release to requesting military recruiters lists of names, addresses and telephone numbers of students who have not filed objections.[14] Prior to this most recent amendment, Congress had provided

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[12]*See, e.g.*, "USA Patriot Act casts doubt on what we once took for granted," Spokesman Review September 10, 2002 at A1 and A5 (reporting that the King County, WA Library successfully asked a court to quash an FBI subpoena of all its information on a terrorism suspect).

[13]20 U.S.C. §1232g(a)(5); 34 C.F.R. §§ 99.3; 99.37.

[14]The actual statutory language is as follows:

"(c) ACCESS TO SECONDARY SCHOOLS.–(1)(A) Each local educational agency receiving assistance under the Elementary and Secondary Education Act of 1965--
"(i) shall provide to military recruiters the same access to secondary school students as is provided generally to postsecondary educational institutions or to prospective employers of those students; and
"(ii) shall, upon a request made by military recruiters for military recruiting purposes, provide access to secondary school student names, addresses, and telephone listings, notwithstanding section 444(a)(5)(B) of the General Education Provisions Act (20 U.S.C. 1232g(a)(5)(B)).
"(B) A local educational agency may not release a student's name, address, and telephone listing under subparagraph (A)(ii) without the prior written consent of a parent of the student if the student, or a parent of the student, has submitted a request to the local educational agency that the student's information not be released for a purpose covered by that subparagraph without prior written parental consent. Each local education agency shall notify parents of the rights provided under the preceding sentence.".

PL 107-107 (2002), to be codified at 10 U.S.C. § 503(c). (While beyond the scope of this paper, the

the military with the "same access to . . . directory information. . . as is provided generally to employers and post-secondary institutions." Now the military has a right of access no matter what a school does for employers and colleges. This amendment appears to make the military the only entity aside from parents with a FERPA right of access. Other FERPA provisions for nonconsensual access (e.g. to other employees within a school with a legitimate educational interest, or to a new school to which the student is transferring) are discretionary: the school has the authority but not the obligation to release the records without written consent from the family.

A few schools are excluded from these provisions: those schools which "by majority vote of the[ir] governing body" have a policy denying recruiting access or access to directory information, and private schools which have a documented religious objection to military service.[15]

Schools are required to notify parents of their right to object to release. It is unclear whether a general directory information objection suffices to remove a student from lists given to military recruiters, or whether a specific military recruiting information objection must be made. The safe approach would appear to be for schools in their annual FERPA notifications to inform families of the school's obligations with respect to military recruiters, and to afford them a chance to object either generally to releasing directory information to all persons, or specifically to release of information to military recruiters.

III. Sharing of disciplinary records of transferring students as a means of combating student drug use

In the omnibus No Child Left Behind Act, Congress amended the Safe and Drug Free Schools and Communities Act ("SDFSCA") concerning the sharing of disciplinary records of students who transfer between schools. Apparently based upon the premise that when a student with a disciplinary record transfers to a new school, the new school should know of the student's history, public schools are now specifically authorized to use SDFSCA funds for "[e]stablishing or implementing a system for transferring suspension and expulsion records, consistent with [FERPA], by a local educational agency to any public or private elementary school or secondary school."[16] Moreover, states are required by January 2004 to have a system in place to "facilitate the transfer of

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amendment also requires school to afford the military access to recruiting functions such as college fairs.)

[15]10 U.S.C. §503(c)(5), as amended by PL 107-107.

[16]The actual statutory language reads as follows:
"(2) AUTHORIZED ACTIVITIES.--Each local educational agency, or consortium of such agencies, that receives a subgrant under this subpart may use such funds to carry out activities that comply with the principles of effectiveness described in subsection (a), such as the following . . . .
(E) Drug and violence prevention activities that may include the following:. . .
(xvi) Establishing or implementing a system for transferring suspension and expulsion records, consistent with section 444 of the General Education Provisions Act (20 U.S.C. 1232g), by a local educational agency to any public or private elementary school or secondary school."
PL 107-110, to be codified at 20 USC §7115.

disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school."[17]

THE SUPREME COURT AND FERPA

From 1974, the year of FERPA's enactment, until 2002, the Supreme Court never heard a FERPA case. In 2002, after essentially ignoring FERPA for over 25 years, the Court decided not one but two FERPA cases in the same 2001-2002 term. In *Owasso Indep. Sch. Dist. No I-011 v. Falvo*, the Court held that the practice of peer grading did not violate FERPA. In *Gonzaga University v. Doe,* the Court held that FERPA violations are not actionable under 42 U.S.C. §1983 (hereinafter "Section 1983").

I. Owasso Indep. Sch. Dist. No I-011 v. Falvo

A. The issue

In pertinent part, FERPA defines "education records" as those "maintained" by a school or by "a person acting for" the school.[18] The 10th Circuit unanimously held in *Falvo* that the peer graded papers, although never actually turned in to the teacher, were "maintained" education records since the grades on them were recorded in the teacher's grade book.[19] The 10th Circuit also held that the student peer graders were persons "acting for" the school, although not of course employees. Although no other federal courts had ruled on this issue, the Supreme Court granted certiorari. The Supreme Court unanimously held that peer grading of papers in a public elementary school did not violate FERPA, deciding that this scenario did not involve FERPA "education records."[20]

B. The facts

In a public elementary school in Oklahoma, students graded one another's papers. After grading the

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[17]The actual statutory language reads as follows:
"SEC. 4155. TRANSFER OF SCHOOL DISCIPLINARY RECORDS.
"(a) NONAPPLICATION OF PROVISIONS.--This section shall not apply to any disciplinary records with respect to a suspension or expulsion that are transferred from a private, parochial or other nonpublic school, person, institution, or other entity, that provides education below the college level.
"(b) DISCIPLINARY RECORDS.--In accordance with the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g), not later than 2 years after the date of enactment of this part, each State receiving Federal funds under this Act shall provide an assurance to the Secretary that the State has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.
PL 107-11, to be codified at 20 U.S.C. §7165.

[18]20 U.S.C. §1232g(a)(4).

[19]*Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203 (10th Cir. 2000).

[20]*Owasso Indep. Sch. Dist. v.Falvo,* 122 S.Ct. 934 (2002).

papers, they were returned to the student, who then called out the grade to the teacher to record in her grade book. At this point each student was free to take her own paper home. Thus, the teacher never actually had possession of the papers. The school did not obtain parent consent to this practice, which would have avoided any FERPA problems. A parent challenged the peer grading practice as a FERPA violation. Part of the parent's concern stemmed from the stigma she perceived this practice inflicted on one of her children, who was disabled.[21] Specifically, the parent claimed that the peer grading and calling out of grades resulted in class-wide knowledge of the (sometimes not excellent) grades her child received. However, the parent did not include an IDEA, Section 504, or ADA disability discrimination claim, nor a claim that the IDEA's records provisions were violated, in her suit. The parent did assert a constitutional privacy claim, which was rejected by the trial court and the 10th Circuit. The Supreme Court's grant of certiorari was limited to the statutory FERPA issue.

C. The majority opinion

The majority opinion authored by Justice Kennedy is quite brief, comprising about four pages of the Supreme Court reporter. It refers to none of the numerous federal and state court decisions interpreting FERPA. Nor does the majority opinion refer to the disabled status of one of the plaintiff's children -- the majority merely notes that "respondent claimed the peer grading embarrassed her children."[22] As is discussed in more detail below, the Court reserved the question of FERPA's actionability under Section 1983.

On the merits, the Court held that peer graders are not "persons acting for" schools, and that peer graded papers which were never in the teacher's physical possession were not "maintained" by the school. As to who "acts for" a school, the Court held that "[t]he phrase 'acting for' connotes agents of the school, such as teachers, administrators, and other school employees."[23] The Court contrasted these agents with the student peer graders, whom the Court found to be grading for instructional reasons rather than as agents performing a task for the school's benefit.

As for records "maintained" by a school, the Court found that peer graded papers which never were in the physical possession of the teacher were not maintained by the school. The Court reserved the question of whether the graded papers, once in the teacher's possession, would then be "maintained" and subject to FERPA. To arrive at this conclusion, the Court noted that the dictionary defined "maintain" to refer to "keep in existence or continuance; preserve; retain."[24] The Court noted that the results of the peer-graded tests and assignments would

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[21] *See Falvo*, 233 F.3d 1203, 1208 (10th Cir. 2000) (noting that one of the plaintiff's children was an IDEA student, but rejecting the claim that the IDEA created a constitutional expectation of privacy in that student's education records).

[22] 122 S.Ct at 937.

[23] *Id.* at 939.

[24] *Id.* at 939 (citation omitted).

be recorded in the teacher gradebook, which the Court noted itself might be excluded from FERPA as a sole possession note. The Court suggested that "maintain" referred to storage of central office files "in a filing cabinet in a records room at the school, or on a permanent secure database. . . ."[25] The Court noted that FERPA also requires schools to "maintain" an access log of disclosures to outsiders, and suggested that it would be unworkable for access logs to be maintained by individual teachers. Finally, the Court suggested that to find peer graded assignments to be FERPA records would create a right to an internal hearing to challenge their accuracy, a result the Court found to be unworkable.

The Court's reasoning also included consideration of both instructional ramifications and of federalism principles. The Court noted that peer grading was a widespread, accepted instruction practice.[26] The Court recognized the pedagogical benefit of peer grading:

> "Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach the material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on. We do not think FERPA prohibits these *educational techniques*."[27]

The Court also perceived several educational harms to result from holding that FERPA prohibits peer grading:

> "substantial burdens on teachers across the country. It would force all instructors to take time, which otherwise could be spent teaching and in preparation, to correct an assortment of daily student assignments. . . .[and] make it much more difficult for teachers to give students immediate guidance. . . .[and] force teachers to abandon other customary practices such as group grading of team assignments. . . if a teacher . . . put a happy face, a gold star, or a disapproving remark on a classroom assignment, [FERPA would] not allow other students to see it."[28]

The Tenth Circuit had noted some of these same pedagogical concerns, but found that separation of powers principles required them to leave to Congress any changes to FERPA to improve its instructional ramifications. In contrast, the Supreme Court found these instructional consequences to influence its interpretation of the statute.

Finally, the Court suggested that principles of federalism dictated its holding. The Court indicated that upholding the Tenth Circuit would

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[25] *Id.* at 939.

[26] *Id.* at 937 ([t]he . . . teachers, like many teachers in this country, use peer grading").

[27] *Id.* at 939 (emphasis added).

[28] *Id.* at 940.

> "effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation."[29]

The Court concluded that

> "We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the [Tenth Circuit] interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics throughout the country."[30]

D. Justice Scalia's concurrence

In a concurring opinion comprising less than a single page of the Supreme Court reporter,[31] Justice Scalia disagreed with the majority's suggestion that FERPA records are limited to those which are centrally maintained. Justice Scalia noted that FERPA's exclusion of sole possession notes (which include certain non-centrally maintained documents such as confidential teacher and counselor notes from meetings with students and perhaps a teacher grade book) would be meaningless if all non-centrally maintained records were excluded by FERPA. The concurrence noted that such a result is inconsistent with basic principles of statutory construction.[32]

The concurring opinion agreed with the majority that while peer-graders are not persons acting for schools and thus papers in possession of the peer graders are not FERPA records. The concurring opinion did not explain its reasoning on this point, except to refer to the "ordinary meaning" of the phrase a "person acting for" a school.

E. How broadly should *Falvo* be read?

The obvious, and troubling, question for education law attorneys and practitioners is just how narrowly or broadly *Falvo* should be read. The Court notes that it "limit[ed] our holding to this narrow point" that "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book."[33] The Court explicitly noted that "[w]e . . . do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by [FERPA]."[34] However, in getting to this "holding on a narrow point," the Court 1) held that student graders were not "persons acting for a school," 2) held that graded assignments not turned in to, but recorded by, a teacher were

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[29] *Id.* at 939.

[30] *Id.* at 940.

[31] 122 S.Ct. at 941 (Scalia, J., concurring).

[32] *Id.* (Scalia, J., concurring)(citation omitted).

[33] 122 S.Ct. at 940.

[34] *Id.* at 941.

not records "maintained" by a school, and 3) suggested (albeit in dicta, but repeatedly) that FERPA records were limited to those maintained in a central file. In fact, are FERPA records limited to those kept in a central file? Is student status mutually exclusive with status as a "person acting for" a school? Is physical possession and/or retention a prerequisite for "maintained" education records?

Some guidance on the central file issue may be had from the Sixth Circuit's post-*Falvo* holding that discipline records are covered by FERPA.[35] Although many discipline records are not maintained in a central file, the Sixth Circuit found that FERPA's records definition "was not content-based" and held that discipline records were covered by FERPA, apparently without regard to whether they were kept in a central file. It is significant that the *Miami* case was brought by the federal government (specifically the Department of Justice) to enforce FERPA, and the federal government argued FERPA includes discipline records, apparently without regard to their location.

II. Gonzaga University v. Doe

A. The issue

In *Falvo*, the Tenth Circuit performed a sua sponte analysis, for jurisdictional purposes, of FERPA's actionability under Section 1983. As had all federal appeals courts which had addressed the issue, the Tenth Circuit held that FERPA violations could form the basis of Section 1983 suits. At the United States Supreme Court, the *Falvo* certiorari petition addressed only the existence of a FERPA violation, and not its actionability under Section 1983. However, one of the amicus briefs urged the Court to address the Section 1983 issue. At oral argument, the Court raised the Section 1983 issue and in its opinion indicated it was reserving the Section 1983 question. In *Gonzaga University v. Doe* (hereinafter *"Gonzaga"*) the Court was asked to squarely address this issue as well as the Washington Supreme Court's holding that Gonzaga, a private Jesuit school, was acting under color of state law. The Court took certiorari of the case, but limited to the Section 1983 issue.[36] A majority of the Court held in *Gonzaga* that FERPA claims were not actionable under Section 1983.[37]

B. The facts

The *Gonzaga* case arose when school officials attempted to deal with a claim that one of its undergraduate students had raped another student. The alleged victim later recanted her rape claim. The student suspected of rape was in Gonzaga's teacher certification program. State law requires teacher preparation programs to certify to the state that a candidate is of good moral character. In conjunction with preparing this character reference, Gonzaga employees discussed the situation, including the accused student's name, with an official at the state department of education.

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[35]*U.S. v. Miami University*, 294 F.3d 797 (2002).

[36]It is unfortunate the Court did not hear the under color of state law issue. Finding a private Jesuit university supplying information to a state agency to amount to act under color of state law seems a clear error.

[37]122 S.Ct. 2268 (2002).

The accused student sued Gonzaga in state court on several tort and contract theories, as well as a FERPA- based Section 1983 claim. A jury found for the student, and awarded $1,155,000 in damages, which included $150,000 compensatory and $300,000 punitive damages for the FERPA violation, as well as attorney's fees.[38] The case was appealed through the state court system, then a certiorari petition was filed with the U.S. Supreme Court.

C. The majority opinion

In an opinion authored by Chief Justice Rehnquist, a majority of the Court held that FERPA created no rights enforceable under Section 1983. Five Justices joined the opinion, while two concurred in the judgment (and wrote a separate opinion) and two others dissented.

In Section 1983 Congress provided a tort remedy for persons whose "rights, privileges or immunities secured by the Constitution *and laws*" (emphasis added) are violated by government actors. In prior cases, the Court had articulated and repeatedly applied a two part test to determine whether a particular federal statute was one of the "laws" Congress has made actionable under Section 1983. First, the Court examined whether the statute in question created benefits which were determinate enough to be enforceable. If the rights were instead vague and ambiguous, the statute would not be actionable under Section 1983. Second, the Court examined whether Congress had created a comprehensive remedy which would foreclose enforcement under Section 1983.[39] In the majority opinion in *Gonzaga*, the Court purported to affirm this analysis, but announced several new principles. First, the Court announced a sort of unofficial presumption against Spending Clause legislation creating Section 1983-enforceable rights; the Court noted that the normal remedy for violations of Spending Clause legislation was termination of funding rather than private lawsuits. Second, the Court announced that the analysis used to decide if a statute created a private cause of action relevant to determining if the same statute was enforceable under Section 1983. Finally, the Court distinguished Section 1983-enforceable statutes such as Title VI and Title IX which are couched in the language of personal interests with statutes such as FERPA which it found to be couched in systemic language rather than "unambiguously conferring individual rights." Applying these new principles, the Court noted that FERPA was Spending Clause legislation never found by any court to create a private right of action or specifically intended by Congress to be enforceable under Section 1983, and was couched in systemic language, threatening termination of federal funding to schools which has a "policy or practice" prohibited by FERPA. The majority thus held that FERPA did not create sufficiently definite individual rights to be enforceable under Section 1983.

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[38] *See Doe v. Gonzaga Univ.*, 24 P.3d 390 (Wash. 2001).

[39] *See, e.g., Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992). The Court did not reach the second prong of this analysis in *Gonzaga*. 122 S.Ct. at 2279 n.8.

D. The dissent

The two dissenters attacked both the majority's announced doctrine and its application to FERPA.[40] The dissenting opinion noted that in its most recent case on point the Court found the first prong of the test for finding presumptive Section 1983-actionable "rights" to be satisfied when the statute was directed at a particular class, used mandatory language, and did not create rights which were in fact vague and ambiguous.[41] Applying this standard, the dissent found FERPA's language was mandatory, in fact actually used the word "rights" numerous times,[42] was aimed at a specific class of students and parents, and created rights such as access to one's own records which were less ambiguous than ones found by the Court to be actionable under Section 1983 in other cases. As to the majority's emphasis on FERPA's use of systemic language, the dissent noted that a systemic problem might be a requirement for individual relief, but still created individual rights. The dissent also criticized the majority's intermixing of private cause of action cases with Section 1983 enforcement doctrine. Turning to the second, "comprehensive remedy" prong of the analysis, the dissent reviewed the FPCO complaint and termination of federal funding remedies available under FERPA and found them to "fall far short" of being comprehensive remedies which would render unnecessary enforcement under Section 1983. Finally, the dissent noted that all federal appeals courts addressing the issue had found FERPA to be actionable under Section 1983.

E. Unanswered questions

Several questions arise from the *Gonzaga* decision.

First, under the Court's new approach to determining if federal statutes are actionable under Section 1983, are there other statutes regulating schools which can no longer form the basis for Section 1983 claims?

Second, after *Gonzaga* is there any meaningful way to enforce FERPA? The statute and regulations set out two enforcement mechanisms. First, the federal government can move to terminate all of an offending school's federal education funding. This is of course a drastic remedy, and one which has apparently never been invoked nor even initiated. Second, individuals who believe their FERPA rights have been violated can file a complaint with the Family Policy Compliance Office ("FPCO") in Washington D.C. The FPCO can investigate these complaints and seek voluntary compliance by the offending school. There is no hearing, no timelines for processing complaints, and no compensation or other recourse for the student.

A recent case, *U.S. v. Miami University ("Miami")*[43] points out a third enforcement possibility -- the FPCO may ask the Department of Justice to enforce FERPA. In *Miami*, the federal government sought injunctive

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[40] 122 S.Ct. at 2280 (Stevens, J., joined by Ginsburg., J., dissenting).

[41] *Blessing v. Freestone,* 520 U.S. at 340-341.

[42] A review of the statute shows the words "right" or "rights" to be used 11 times in FERPA, including of course the title.

[43] 294 F.3d 797 (6th Cir. 2002).

relief against a private university for alleged FERPA violations. The Sixth Circuit held that the *Gonzaga* decision did not affect the availability of federal enforcement. *Miami* is apparently the only occasion where the federal government has sued to enforce FERPA.

State law claims are also available, although a close examination of the *Gonzaga* case shows their availability is more theoretical than real. Some states have statutes governing student records which may be privately enforced.[44] The student plaintiff in *Gonzaga* brought five state law claims (defamation, negligence, breach of educational contract and invasion of privacy) as well as a FERPA/Section 1983 claim. The *Gonzaga* plaintiff's $1.155 million verdict, which at first glance suggests the availability of substantial damages for FERPA violations, in fact demonstrates that removing Section 1983 claims as a remedy for FERPA violations leaves injured students with no meaningful remedy. The bulk of the *Gonzaga* jury's damages award ($950,000 of $1,155,000 as well as the attorney's fees award) came from the defamation ($500,000) and FERPA/Section 1983 ($450,000 plus attorney's fees) claims. After the *Gonzaga* decision, FERPA/Section 1983 claims are no longer available. Defamation claims can only be successful when the plaintiff proves the statements made about her are false. Most unauthorized disclosures under FERPA involve accurate information (for example, unauthorized sharing of a student's grades or IQ test scores), thus defamation claims will normally be unavailable for FERPA violations involving disclosure.[45] In short, absent unusual circumstances defamation is not a viable claim when FERPA is violated.

The other three claims appeared not to be directly about the alleged FERPA violation. The negligence claim in *Gonzaga* was not really directly a FERPA claim, but instead alleged a breach by the school of its duty to perform a reasonable investigation of the rape allegations.[46] Similarly, the breach of educational contract claim related to school handbook language providing students accused of misconduct with a chance to be heard, rather than a FERPA violation.[47] Finally, the invasion of privacy claim related not to the FERPA violation but to the investigation preceding it. Specifically, the Washington Supreme Court held that the school's investigation, pursuant to the rape allegation, of the plaintiff's "personal relationships, habits, and even anatomy. . . the intimate details of a [teacher certification] candidate's sex life" to make out the "highly offensive" intrusion into the

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[44]Washington does not have such a statute, so it was not an issue in the *Gonzaga* case.

[45] FERPA can also be violated by failing to give parents/adult student access to their own records, by not offering requesting parents/adult students an internal hearing to challenge the accuracy of their own records, or by not providing parents/adult student with an annual notification of their FERPA rights. In these scenarios, too, defamation claims would not succeed.

[46]This claim resulted in a jury award of $50,000 in damages. The Washington Supreme Court reversed the jury award on negligence, holding that the school had no duty to investigate and therefore that no breach occurred.

[47]This claim resulted in a jury award of $55,000.

plaintiff's private affairs required to succeed with this claim.[48]

In sum, the *Gonzaga* plaintiff ultimately received no money damages as direct compensation for his FERPA rights being violated. As has been discussed elsewhere, the *Gonzaga* situation is not atypical; normally the only meaningful available remedy for FERPA violations has been Section 1983 claims, and that recourse is no longer available.

The *Gonzaga* decision is obviously a disheartening result for prospective FERPA and Section 1983 plaintiffs. As the dissent in *Gonzaga* notes, the FPCO complaint and termination of federal funding remedies, which are under normal circumstances the only recourse for FERPA violations "provide[] no guaranteed access to a formal administrative proceeding or to federal judicial review; rather it leaves to [FPCO] discretion whether to [even] follow up on individual complaints."[49] Discipline of school employees who violate FERPA is also an option. The nagging question, though, is whether FERPA continues to have enough enforcement "teeth" to ensure continued compliance?

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[48]The plaintiff in *Gonzaga* was awarded $100,000 for invasion of privacy, which was upheld by the Washington Supreme Court

[49]122 S.Ct. At 2283 (Stevens, J., dissenting).

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